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20 IN THE UNITED STATES DISTRICT COURT

21 SOUTHERN DISTRICT OF CALIFORNIA

22 16 SAMBREEL HOLDINGS LLC; YONTOO LLC;
23 and THEME YOUR WORLD LLC,

24 Plaintiffs,
25 vs.
26 FACEBOOK, INC.,
27 Defendant.

28 Case No. 3:12-CV-00668-CAB-KSC

**PLAINTIFFS' OPPOSITION TO
FACEBOOK'S EX PARTE APPLICATION
FOR AN EXPEDITED RULE 16
SCHEDULING CONFERENCE AND AN
ORDER FOR EXPEDITED BRIEFING AND
DISCOVERY.**

Hon. Karen S. Crawford

Hearing Date:
Hearing Time:
Dept:

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1 **I. INTRODUCTION**

2 This case stems from Facebook's campaign to drive a competitor out of the market. Facebook
 3 has engaged in an ongoing, illegal campaign to force Sambrel to stop offering advertising that competes
 4 directly with Facebook's advertising. On March 19, 2012, Sambrel filed this action and filed a motion
 5 for preliminary injunction that seeks to stop the two most damaging aspects of Facebook's
 6 anticompetitive scheme: (1) Facebook's coercion of advertising partners to boycott Sambrel's product,
 7 and (2) Facebook's "gating" of Sambrel users – *i.e.*, scanning Facebook users' web browsers and
 8 requiring users to uninstall Sambrel's products before accessing www.facebook.com. Currently, the
 9 motion for preliminary injunction is set for a hearing on April 25. Facebook requests that this Court
 10 delay that hearing so that it can undertake "expedited" discovery and so that it can file a motion to
 11 dismiss. This Court should deny Facebook's *ex parte* application.

12 First, the preliminary injunction hearing should be expedited because Sambrel is suffering
 13 ongoing irreparable harm. The irreparable harm Sambrel is currently facing is described in detail in
 14 Sambrel's preliminary injunction papers. *See Doc. No. 3-1.*¹ To this day, Facebook continues to gate a
 15 small number of Sambrel users, directing them to uninstall all Sambrel products prior to allowing them
 16 to access Facebook's website. And Facebook has not relented on its group boycott, denying Sambrel
 17 access to a large portion of the advertising market. These actions are significant and are causing lasting,
 18 irreparable harm on a daily basis. In light of the ongoing harm, the motion for preliminary injunction
 19 should be heard and decided without delay.

20 Second, Facebook is already in a position to respond to Sambrel's motion for preliminary
 21 injunction. Facebook does not dispute that it engaged in the conduct challenged by the preliminary
 22 injunction. Presumably, Facebook knows why it engaged in this course of conduct. Facebook should,
 23 therefore, already be prepared to explain its actions to the Court. Indeed, Facebook spends much of its *ex*
 24 *parte* describing why its actions were justified. Facebook nevertheless demands a delay so that it can
 25 take expedited discovery. Facebook either is seeking a delay for its own sake or is hoping to find
 26

27

 ¹ References to "Doc. No." refer to documents already filed in this action according to their docket entry
 28 number.

1 something in discovery to provide an *ex post* justification for its actions. Neither rationale justifies delay.

2 Third, Facebook has not met – or even attempted to meet – the legal standard for granting
 3 expedited discovery. Facebook must demonstrate that there is “good cause” to allow each of its
 4 discovery requests on an expedited basis. This requires Facebook to demonstrate that it has a strong need
 5 for each particular item of discovery and that its need outweighs the burden on or prejudice to Sambrell.
 6 Rather than attempting to make this showing, Facebook simply asks this Court to take its word for it,
 7 asserting broadly: “Facebook is entitled to discovery to defend itself against an injunction that would
 8 deprive it of control over its own product and its ability to protect its users’ experience.” Doc. No. 10-1
 9 at 9. Facebook’s unsupported, conclusory assertions are not entitled to weight. Its obligation is to
 10 *demonstrate* its entitlement to discovery, not simply to assert it.

11 Fourth, Facebook has not cited a single case that supports its request for expedited discovery.
 12 The cases that Facebook cites involve a *plaintiff* seeking expedited discovery – with varying success.
 13 Facebook does not cite a single case involving a *defendant* requesting, much less receiving, expedited
 14 discovery to respond to a preliminary injunction. Sambrell has located a single case in which a
 15 defendant requested such discovery, and, in that case, this Court rejected a much more limited set of
 16 requests than Facebook seeks in spite of the fact that the defendant there attempted to explain its need for
 17 the particular discovery. *See Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-cv-1166, 2008
 18 WL 3992353, at *1 (S.D. Cal. Aug. 28, 2008).

19 Fifth, the scope of Facebook’s request for “expedited” discovery is unprecedented. Facebook
 20 seeks to serve fifteen wide-ranging document requests, eleven interrogatories (including contention
 21 interrogatories), and four deposition notices.² Facebook’s expedited discovery amounts to a relatively
 22 complete round of discovery on the merits, and it would take Sambrell several *months* to comply just
 23 with the document requests. In the past, courts – including in the very cases cited by Facebook in its *ex*
 24 *parte* application – have readily rejected expedited discovery requests that go beyond one or two very
 25 narrowly defined requests for production. *See, e.g., Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 11-
 26

27 ² Facebook also suggests that it will want to take some third-party discovery. Facebook does not identify
 28 the third party, explain the topics of the discovery, or set out the particular requests it will make.

1 CV-01846-LHK, 2011 WL 1938154, at *3-*4 (N.D. Cal. May 18, 2011) (rejecting a request for a
 2 deposition and the production of documents and allowing *only* the production of five sample products,
 3 the product packaging, and package inserts); *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D.
 4 273, 276-77 (N.D. Cal. 2002) (requiring a defendant in a patent infringement suit to produce core
 5 technical documents of a single accused product and noting that the request was narrowly tailored and
 6 did not require the production of a witness for a deposition). The breadth of Facebook's request is
 7 shocking when considered against the case law, so it is hard to fathom how Facebook could have even a
 8 good faith basis for its request.

9 Sixth, Facebook's request that this Court expedite the briefing and hearing on an as-of-yet unfiled
 10 motion to dismiss and delay the preliminary hearing schedule until after that motion is decided is without
 11 merit. Facebook is free to present the legal arguments it would submit as part of the motion to dismiss as
 12 bases to deny the motion for preliminary injunction. Facebook nevertheless suggests that this Court
 13 should delay the preliminary injunction hearing so that it can address underlying "legal issues" first. This
 14 request is an unabashed attempt to delay for its own sake. In light of the fact that Sambrell's motion for
 15 preliminary injunction is already partially briefed and on the Court's calendar, the most expeditious
 16 means for Facebook to raise these legal challenges is as part of its opposition to the motion for
 17 preliminary injunction.³

18 Finally, the balance of equities supports proceeding with the motion for preliminary injunction
 19 expeditiously. There is no prejudice in proceeding with the hearing on the motion for preliminary
 20 injunction. Facebook will be free to conduct discovery during the ordinary course. And either party will
 21 be free to ask the Court to modify any preliminary injunction that is issued based upon newly discovered
 22 facts or circumstances. Delaying a decision on the motion for preliminary injunction, on the other hand
 23 will lead to continuing irreparable harm to Sambrell. As such, the best course is to proceed with the
 24 preliminary injunction hearing without delay. Facebook's motion should be denied.

25
 26

 27 ³ To allow for an orderly procession and to avoid unnecessary work for the parties and the Court,
 28 Sambrell would willingly stipulate that Facebook be given 21 days after the Court's decision on the
 preliminary injunction to file a motion to dismiss. This approach avoids duplicative briefing and will
 allow Facebook to avoid briefing issues the Court has already rejected.

1 **II. STATEMENT OF FACTS**

2 This case stems from a long-running dispute between Facebook and Sambrell, and Facebook has
 3 been aware of the relevant issues for a considerable amount of time. As set forth in Sambrell's
 4 Memorandum of Points and Authorities in Support of its Motion for Preliminary Injunction, Sambrell
 5 and Facebook have a long history of interactions. *See* Doc. No. 3-1 at 6-10. Facebook has had legal
 6 counsel interacting with Sambrell since October 2010. *See* Doc. No. 3-8 at 54. Throughout these
 7 interactions, Sambrell has attempted to address Facebook's purported concerns and has altered the
 8 operation of PageRage on multiple occasions to address Facebook's requests.⁴

9 In spite of Sambrell's best efforts to address Facebook's concerns and apparently after consulting
 10 with legal counsel, Facebook initiated the course of anticompetitive behavior that Sambrell seeks to
 11 enjoin with the motion for preliminary injunction. Beginning in July or August 2011, Facebook began
 12 contacting Sambrell's advertising partners to coerce them to cease doing business with PageRage. As a
 13 result of these contacts, Sambrell lost seven major advertising partners between the end of August and
 14 the end of November. *See* Doc. No. 3-6, ¶ 3.

15 In December 2011, Facebook chose to escalate the dispute between the parties by sending a
 16 cease-and-desist letter to Sambrell and by making various statements to the media about its intention to
 17 employ technical means to block Sambrell's users from accessing Facebook. Sambrell responded
 18 immediately. On December 16, 2011, Sambrell sent a cease-and-desist letter to Facebook, which raised
 19 various antitrust issues. *See* Letter from M. Radcliffe to J. Cutler (Dec. 16, 2011) (attached as Ex. 1 to
 20 the Declaration of R. Klinck). Facebook nevertheless chose to move forward with its gating campaign.
 21 Sambrell promptly lost over one million users and was forced to accede to Facebook's demand to stop
 22 advertising on PageRage.

23 The parties had a series of discussions in January 2012, but those discussions did not resolve the
 24 issue. During this period, Facebook continued to gate some PageRage users in spite of the agreement to
 25 stop doing so. At the time, Facebook stated that there were technical glitches that were causing the

26
 27 ⁴ Sambrell removed PageRage from the Facebook Platform at Facebook's request and has been
 28 operating the product independent from that system since July 2009. As a result, PageRage is not subject
 to Facebook's terms and conditions.

1 continued gating. On January 30, 2012, Facebook's in-house counsel sent an e-mail to Sambrell's CEO,
 2 which noted that the parties were at an impasse and foretold litigation: "I will have our lawyers reengage
 3 with yours and Facebook will take what action we deem necessary to maintain the integrity of our site
 4 and services and protect our rights and users." *See* E-Mail from C. Clark to A. Trouw (Jan. 30, 2012)
 5 (attached as Ex. 2 to the Declaration of R. Klinck).⁵ Since that time, Facebook has continued to gate
 6 some PageRage users, albeit not in the same numbers as in December 2011.

7 Sambrell filed its Complaint and Motion for Preliminary Injunction on March 19, 2012.
 8 Sambrell provided Facebook's in-house and outside counsel with courtesy copies of these filings the
 9 same day. *See* E-Mail from R. Klinck to C. Clark and J. Cutler (Mar. 19, 2012) (attached as Ex. 3 to the
 10 Declaration of R. Klinck). The hearing on the preliminary injunction was initially set for April 23, 2012.
 11 After the case was transferred, this Court set a hearing date of April 25, 2012.

12 On March 26, 2012, Facebook's counsel suggested to Sambrell's counsel that the hearing date
 13 needed to be moved so that the parties could engage in expedited discovery and litigate an as-of-yet
 14 unfiled motion to dismiss. In spite of Sambrell's belief that there is no need for a delay and no need to
 15 conduct discovery, Sambrell's counsel responded later that day by offering to agree to Facebook's
 16 proposal so long as Facebook would agree to a stipulated order that would prevent it from engaging in
 17 the conduct Sambrell is challenging – both the gating and the boycott – during the interim. *See* Doc. No.
 18 10-3 at 4-5 (E-Mail from D. Kotchen to J. Basile). Facebook balked at this proposal on multiple
 19 occasions. *See id.* at 4 (E-Mail from J. Basile to D. Kotchen) (referring to Sambrell's proposal as a
 20 "counterproductive demand"); *see also id.* at 2 (E-Mail from J. Basile to D. Kotchen). In a telephone call
 21 on March 28, 2010, Facebook's counsel suggested that he was willing to send an e-mail to Sambrell's
 22

23 ⁵ Facebook incorrectly asserts repeatedly that Sambrell should not be heard to complain about
 24 irreparable harm because it waited eight months to file suit. This argument badly distorts the facts.
 25 Facebook started to threaten Sambrell's advertising partners in July or August. But the departures of
 26 advertisers from PageRage were spaced out throughout the fall, and the magnitude of the loss did not
 27 become clear until late 2011. Facebook began its gating campaign soon thereafter, forcing Sambrell to
 28 cease advertising on PageRage. Now Sambrell is, in effect, starting from scratch: it's trying to relaunch
 PageRage advertising, but – as a result of the boycott – cannot secure the business of its primary
 advertising partners. Thus, the demand for PageRage advertising is lower, Sambrell's ability to market
 PageRage is diminished, and the rates for PageRage advertising are depressed. Facebook cannot credibly
 dispute that its boycott is causing irreparable harm.

1 counsel stating that Facebook would not gate Sambrell users until the preliminary injunction was
 2 decided. That offer did not include any enforceable order or a proposal that Facebook would cease the
 3 boycott. *See* Declaration of R. Klinck ¶ 2.⁶

4 Facebook has now filed its *Ex Parte* Application requesting a delay in the preliminary injunction
 5 hearing to conduct expedited discovery and to conduct expedited briefing on a motion to dismiss. The
 6 discovery Facebook proposes is incredibly broad and includes: (a) four depositions of Sambrell
 7 employees (without any limitations);⁷ (b) eleven interrogatories, including a number that require
 8 identification of all documents, facts, and witnesses that support the allegations in the complaint and
 9 preliminary injunction papers; and (c) fifteen document requests, including requests for wide-ranging
 10 categories of documents related to Sambrell products; all communications with advertisers; all
 11 communications between Sambrell and the “past, current, and prospective” users of many of its
 12 products; and all documents identified in Sambrell’s interrogatory responses, which (as mentioned)
 13 request Sambrell to identify all documents relevant to its case. *See* Doc. No. 10-7.

14 Facebook concedes that there remains some residual gating of PageRage users. *See* Doc. No. 10-
 15 1 at 3 n.2 (admitting that an “immaterial number of PageRage users may be unintentionally gated”).
 16 Facebook maintains that this is not intentional, but is instead the result of “previous detection due to
 17 malware mitigation.” *Id.* Facebook offers no explanation for why it cannot simply turn off the gating.
 18 Moreover, Sambrell continues to receive reports that some of its users are being instructed to remove the
 19 Yontoo Platform in order to access Facebook’s website. *See* Declaration of A. Trouw ¶ 2.⁸

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21 ⁶ In his declaration, James Basile states that Facebook offered to agree in writing not to gate. *See* Doc.
 22 No. 10-2, ¶ 8. The precise offer was that Mr. Basile would send an e-mail to Sambrell’s counsel with
 23 this assurance. *See* Klinck Decl. ¶ 2. Sambrell’s counsel considered this proposal but concluded it was
 24 unworkable for a number of reasons, including that Facebook’s proposed schedule is unrealistic in light
 25 of its document requests and the offer did not include an agreement to cease the boycott.

26 ⁷ Facebook requests the right to take five depositions, and in earlier correspondence, Facebook suggested
 27 its desire to take a Rule 30(b)(6) deposition without any description of the topics it intended to cover.
 28 Presumably, this is the fifth deposition that Facebook intends to pursue if the Court allows expedited
 discovery.

29 ⁸ It is easy enough for Facebook to simply assert that the gating is “immaterial” when it is not the party
 30 that is losing users on a daily basis. Facebook presumably would not view it as “immaterial” if Sambrell
 31 were causing it to lose even a single user on a daily basis. It will likely be exceptionally difficult for
 32 Sambrell to reacquire users who are lost as a result of the gating. As such, Sambrell continued loss of
 33 users – however large – as a result of Facebook’s actions is causing irreparable harm on a daily basis.

1 **III. ARGUMENT**

2 The single most pressing issue in this case at this juncture is to alleviate the irreparable harm
 3 Sambrell is suffering as a result of Facebook's actions. Facebook will suffer no prejudice if Sambrell's
 4 preliminary injunction is decided at the currently set hearing; yet Sambrell suffers ongoing irreparable
 5 harm each day in which resolution of Sambrell's motion is delayed. Accordingly, this Court should not
 6 delay the hearing on the preliminary injunction, should not grant Facebook's request for expedited
 7 discovery, and should not enter an order expediting the motion to dismiss briefing. Under this Court's
 8 Local Rules, a party who files a motion, including a preliminary injunction motion, is entitled to set the
 9 motion for a hearing at the Court's earliest convenient time that is at least 28 days after the filing. *See*
 10 Local Rule 7.1(b) & (e)(1). Sambrell acted within its rights to schedule its motion for preliminary
 11 injunction under this Rule, initially obtaining a hearing date that was 35 days after the motion was filed
 12 (and that date has been extended by two days).

13 Moreover, the current schedule is consistent with the case law regarding the timing for
 14 consideration of motions for preliminary injunctions. Because motions for preliminary injunction are
 15 aimed at preventing irreparable harm, courts have noted that such motions should be resolved
 16 expeditiously. *See, e.g., Ciena Corp. v. Jarrard*, 202 F.3d 312, 319-20 (4th Cir. 2000) (noting that
 17 motions for preliminary injunctions are by their nature time-sensitive and affirming district court's entry
 18 of preliminary injunction when defendant was given 2 days notice); *Laster v. District of Columbia*, 439
 19 F. Supp. 2d 93, 99-101 (D.D.C. 2006) (noting that the urgency of a preliminary injunction request
 20 controls timing and rejecting the argument that allowing defendants less than five days was improper).
 21 The defendant must be given notice of a preliminary injunction hearing and an adequate opportunity to
 22 respond, but courts have often held that notice of five days or less is sufficient. *See General Motors*
 23 *Corp. v. Let's Make A Deal*, 223 F. Supp. 2d 1183, 1189 (D. Nev. 2002) (collecting cases).

24 Thus, the current hearing date is presumptively appropriate under both the Local Rules and the
 25 requirements for filing and hearing a motion for a preliminary injunction. Facebook asserts, however,
 26 that the schedule should be extended so that it may conduct expedited discovery and so that the Court
 27 may consider an as-of-yet unfiled motion to dismiss. These arguments are without merit.

1 **A. Facebook Should Not Be Allowed To Conduct Expedited Discovery.**

2 Facebook's suggestion that this Court should delay the schedule so that it may conduct expedited
 3 discovery is without merit because Facebook is not entitled to conduct expedited discovery.

4 **1. Under The Law, Facebook Must Demonstrate "Good Cause" For Expedited
 5 Discovery On A Request-By-Request Basis.**

6 As Facebook concedes, it must demonstrate "good cause" to take expedited discovery. *See* Doc.
 7 No. 10-1 at 8 (citing *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal.
 8 2002) and *Apple, Inc. v. Samsung Elec. Co., Ltd.*, No. 11-CV-01846-LHK, 2011 WL 1938154, *1 (N.D.
 9 Cal. May 18, 2011)). This standard requires Facebook to demonstrate that it has a "need" for the
 10 discovery and that its "need" outweighs the burden that would be imposed on Sambrell by the expedited
 11 discovery. *See Semitool*, 208 F.R.D. at 276 ("Good cause may be found where the need for expedited
 12 discovery, in consideration of the administration of justice, outweighs the prejudice to the responding
 13 party.").

14 Facebook incorrectly asserts that this Court can – and should – grant Facebook's request for
 15 expedited discovery without considering the propriety of any given request, leaving for another time the
 16 decision about the propriety of each request. *See* Doc. No. 10-1 at 8 fn. 4 & 10 fn. 6. This assertion is
 17 stunning and legally incorrect.⁹ Notably, Facebook does not offer any authority to support this
 18 proposition. And the cases that Facebook cites in its discussion of expedited discovery directly
 19 contradict its position. In each of those cases, the Court expressly considered the propriety of *each*
 20 discovery request in deciding whether to grant the request for expedited discovery. *See Apple*, 2011 WL
 21 1938154, at *3-*4 (considering requests individually and concluded there was not good cause with
 22 respect to two of three requests); *Semitool*, 208 F.R.D. at 277 (considering whether good cause was
 23 shown for single request); *Berlin Media Arts e.k. v. Does 1 through 146*, No. CIV. S-11-2039 KJM, 2011
 24 WL 4056167, at *2 (E.D. Cal. Sept. 12, 2011) (considering whether good cause was met for specific
 25 request). That is also the approach that judges in this District and other districts in the Ninth Circuit have

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 27 ⁹ Facebook's position is also perplexing in light of a meet and confer call held by the parties on March
 28, 2012. During that call, Sambrell's counsel noted that Facebook bore the burden of showing good
 cause for each request specifically. *See* Klinck Decl. ¶ 3. Sambrell's counsel understood Facebook's
 counsel to say they understood this fact and make such a showing. *See id.*

1 adopted. *See, e.g., Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-cv-1166, 2008 WL
 2 3992353, at *1-*2 (S.D. Cal. Aug. 28, 2008) (considering requests individually and concluding that the
 3 good cause standard was not met for any request); *American LegalNet, Inc. v. Davis*, 673 F. Supp. 2d
 4 1063, 1067-71 (C.D. Cal. 2009) (same).

5 Facebook's suggestion that a court should make a "good cause" decision removed from the
 6 individual requests also makes no sense in practice. How is a court to consider the need for or burden of
 7 a request without considering the particular requests individually? Without considering the particular
 8 requests, a court would be left to consider platitudes and generalizations that are completely unhelpful.

9 Facebook apparently believes that it may rely simply upon the fact that Sambrell has filed a
 10 motion for preliminary injunction to demonstrate a need for the discovery. *See* Doc. No. 10-1 at 9
 11 ("Facebook is entitled to discovery to defend itself against an injunction that would deprive it of control
 12 over its own product and its ability to protect its users' experience."). But Facebook's bald assertion
 13 begs the question of whether it needs the discovery to respond to the preliminary injunction hearing.
 14 And the law is clear that "expedited discovery is not automatically granted merely because a party seeks
 15 a preliminary injunction." *American LegalNet*, 673 F. Supp. 2d at 1066. Thus, Facebook may not
 16 simply rely upon the fact that Sambrell has filed a motion for a preliminary injunction; Facebook must
 17 make an affirmative showing based upon the facts of this case that it needs the particular discovery it is
 18 requesting (and that its need outweighs the burden on Sambrell).

19 Moreover, Facebook has not cited a *single* case in which a court ordered expedited discovery
 20 requested by a defendant to oppose a preliminary injunction. In fact, Facebook has not cited a single
 21 case in which a defendant made a request for expedited discovery. Each of the cases cited by Facebook
 22 involved a *plaintiff* requesting expedited discovery. The only case that Sambrell has located in which a
 23 defendant sought expedited discovery to respond to a preliminary injunction is the decision in *Hansen*
 24 *Beverage Co.* that *denied* the request. *See Hansen Beverage Co.*, No. 08-cv-1166, 2008 WL 3992353, at
 25 *1-*2 (S.D. Cal. Aug. 28, 2008). In *Hansen*, the defendant sought to depose certain individuals who had
 26 submitted declarations in support of the motion for preliminary injunction and sought the production of
 27 two categories of documents. *See id.* at 1. This Court rejected the defendant's request, finding that the
 28

1 defendant had not demonstrated a need for the depositions and that the document requests were overly
 2 burdensome because they would require “an extensive search for electronically stored information.” *See*
 3 *id.* at *2.

4 **2. Facebook Does Not Attempt To Demonstrate Good Cause.**

5 In spite of the clear legal authority requiring Facebook to make an individualized showing of
 6 good cause with respect to each discovery request, Facebook does not even attempt to make a good cause
 7 showing for a single one of its requests. Facebook does not explain why it needs any of the requests and
 8 does not discuss the burden of any request. Because Facebook has not attempted to make the required
 9 showing, its motion should be denied.¹⁰ It is not this Court’s job – or Sambrell’s responsibility – to
 10 divine Facebook’s need for the particular requests or to assess the burden without Facebook’s
 11 assistance.¹¹

12 **3. Facebook Does Not Need The Discovery It Requests.**

13 The facts of this case demonstrate that Facebook does not need the requested discovery to
 14 properly respond to the motion for preliminary injunction. Sambrell’s preliminary injunction motion
 15 focuses on actions that Facebook *already undertook* – the group boycott and the gating. Facebook
 16 clearly already knows *why* it decided to engage in the conduct that Sambrell is challenging and it has
 17 ample information to respond to Sambrell’s motion. Having made the decision to engage in actions that
 18 have indisputably harmed (and continue to harm) Sambrell, Facebook should be prepared to explain to
 19 the Court why those actions were lawful. There is no reason for this Court to grant Facebook’s request
 20 for expedited discovery so that it may go on a fishing expedition in hopes of finding information that it
 21

22
 23 ¹⁰ It would be improper for Facebook to attempt to make such a showing for the first time in its reply,
 24 and the Court should decline to consider any such argument. *See Southern California Stroke*
Rehabilitation Associates, Inc. v. Nautilus, Inc., 782 F.Supp.2d 1096, 1113 (S.D. Cal. 2011) (“Because
 25 Defendant raised this argument for the first time in its reply, it is improper, and the Court declines to
 26 consider it.”).

27 ¹¹ Facebook makes much of the fact that Sambrell’s counsel would not specify which discovery it would
 28 respond to in discussions prior to the filing of Facebook’s *ex parte* application. *See* Doc. No. 10-1 at 9.
 29 But Facebook refused to explain its rationale for any of its discovery requests, presumably because it
 30 knows its requested discovery is not necessary at this point. Facebook cannot abdicate its duty of
 31 crafting properly tailored discovery requests and then complain that Sambrell’s counsel should have
 32 done this work for Facebook.

1 can use to provide an *ex post* justification for its actions.

2 Moreover, Facebook has known about the dispute for some time and has had considerable
 3 opportunity to investigate the facts. Facebook has been interacting with Sambrell – with the assistance
 4 of counsel – since October 2010. The correspondence from Facebook indicates that it has been
 5 investigating Sambrell’s product during that time period. And Facebook’s *ex parte* application
 6 demonstrates as much, as Facebook spends considerable effort disparaging Sambrell’s products and
 7 business model. Presumably, Facebook is not asserting that it undertook its course of anticompetitive
 8 conduct without first conducting a thorough investigation. Thus, Facebook should be equally prepared as
 9 Sambrell to move forward with a preliminary injunction hearing now.¹²

10 **4. Facebook’s Requested Discovery Would Impose An Unprecedented Burden.**

11 Even if Facebook could show some marginal need for the discovery, it cannot demonstrate good
 12 cause because the requests are exceedingly broad and will impose a significant burden on Sambrell.
 13 Incredibly, Facebook asserts that its requests are “narrowly tailored.” Doc. No. 10-1 at 9. This assertion
 14 is false. Facebook’s requests would require *months* of time and effort in which to respond. Specifically,
 15 Facebook asks for production of 15 categories of documents, including, for example: (1) documents
 16 related to the development, marketing, strategic plans, functionality, architecture, design, operation,
 17 implementation, specifications, changes, improvements, modifications, proposed improvements, and
 18 proposed or actual new features of any Sambrell product or business unit “designed, created or marketed
 19 for use by Facebook users or for use in conjunction with Facebook” (Doc. Reqs. 1-3); (2) documents
 20 related to the technical, advertising, ad creatives, sales, marketing, customer or user presentation made to
 21 or by Sambrell regarding such products (Doc. Req. 4); (3) *all* communications with advertisers (Doc.
 22 Req. 5); (4) *all* data received by Sambrell from users using such products (Doc. Req. 10); (5) documents
 23 related to any attempt to overcome barriers to posting www.pageage.com (Doc. Req. 11); (6) *all*

24
 25 ¹² Facebook suggests that it is entitled to discovery because Sambrell spent the last eight months
 26 “assembl[ing] a ‘case’ against Facebook.” Doc. No. 10-1 at 2. This argument is specious. Sambrell
 27 prepared its motion for preliminary injunction based purely upon its internal information and the
 28 interactions between the parties – and without the aid of any discovery. To the extent that this constitutes
 as assembling a “case” against Facebook, Facebook unquestionably has been assembling its “case” against
 Sambrell – as evidenced by the content of its *ex parte* application.

1 communications between Sambrell and any “past, current or prospective” users of its product (Doc. Req.
 2 12); (7) documents “to, from, copying, or concerning” six Sambrell employees relating to Facebook, any
 3 Sambrell product that relates in any way to Facebook, or advertising on those products (Doc. Req. 13);
 4 (8) *all* communications between Sambrell and Facebook (Doc. Req. 14).¹³ Facebook also seeks to
 5 propound interrogatories that require it to identify “all facts, witnesses, and documents relating to” the
 6 allegations contained in the Complaint and identify “all documents and things concerning” the
 7 allegations and claims in the Complaint and Motion for Preliminary Injunction papers. And Facebook
 8 requests that Sambrell produce *all* documents identified in responding to the interrogatories. Finally,
 9 Facebook seeks to take free-ranging depositions of four identified individuals.

10 As these examples demonstrate, Facebook’s requests are not “narrowly tailored.” To properly
 11 respond to these requests, Sambrell would be required to collect, review, and produce the vast majority
 12 of the documents – hardcopy and electronic – that are in its possession. This collection would be
 13 necessary to respond to the document requests and/or the interrogatories. And Sambrell would need to
 14 spend time preparing the witnesses for depositions.

15 Facebook’s discovery requests are significantly more extensive and burdensome than discovery
 16 courts have consistently rejected prior to resolving a preliminary injunction. *See, e.g., Hansen Beverage*
 17 *Co.*, 2008 WL 3992353, at *2 (rejecting document requests on two topics because they would require an
 18 extensive search of electronically stored information); *Apple, Inc.*, 2011 WL 1938154, at *3-*4 (denying
 19 the request for a Rule 30(b)(6) deposition and request for production of documents on the grounds that
 20 they would be overly burdensome); *cf. Semitool*, 208 F.R.D. at 277 (noting that the plaintiff was not
 21 seeking “a free ranging deposition” as a factor supporting allowing the discovery). In light of this case
 22 law, it is no wonder that Facebook wants the Court to grant its request for discovery without considering
 23 the particular requests. Facebook’s request for discovery should be denied.

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25

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¹³ Facebook suggests that certain of these requests are not burdensome because they are prefaced with the phrase “documents sufficient to show.” *See* Doc. No. 10-1 at 10. This argument is without merit. A request for “documents sufficient to show” *all* documents will require Sambrell collect and review *all* documents.

1 **5. Facebook's Timeline Is Unreasonable, Further Prejudicing Sambrel.**

2 Facebook's proposal will also lead to considerable prejudice to Sambrel because the proposed
 3 schedule for discovery is unreasonable. Facebook suggests that Sambrel should be required to respond
 4 to its discovery requests, including substantially completing the production of responsive documents by
 5 May 1, 2012. That deadline is impossible in light of the scope of Facebook's requests.

6 To respond to Facebook's document requests and interrogatories, Sambrel would be required to
 7 conduct a complete collection of all of its documents – hardcopy and electronic – that relate to a broad
 8 range of topics, including, without limitation: PageRage, CauseLayouts, a number of other Sambrel
 9 products, Facebook, its advertising plans, its interaction with advertising partners, its interactions with its
 10 users (and prospective users), and its finances. Sambrel would also likely need to collect all e-mail
 11 communications and other electronically stored information in the possession of a large number of its
 12 employees (including at the very least the six identified in Facebook's document requests). Sambrel's
 13 document collection will be complicated by the fact that it was forced to lay off 124 employees or
 14 contractors as a result of Facebook's actions (and has continued to lose important employees through
 15 attrition as a result of Facebook's actions). Sambrel will need to search through now dormant
 16 computers and e-mail accounts without the aid of the employees who used them to find potentially
 17 responsive documents. Contrary to Facebook's assertion that Sambrel should have "no difficulty"
 18 responding to Facebook's requests within the time period, Facebook's timeline is unworkable.¹⁴

19 Sambrel believes that responding to Facebook's proposed discovery will require many months.
 20 The document production alone would likely require four months or more to complete. Compressing the
 21 timeline is not possible. Thus, while Facebook's motion asks – on its face – for a two month delay in the
 22 hearing on the motion for preliminary injunction, it is actually requesting a delay that could easily last six
 23 months. All the while, Sambrel will continue to suffer ongoing irreparable harm as a result of

24
 25 ¹⁴ As with its assertion that it is gating only an "immortal" number of users, it is easy for Facebook to
 26 suggest that Sambrel should have "no difficulty" responding to these requests within the time limits it
 27 proposes because Facebook will not be the party that is required to respond. Sambrel suspects that
 28 Facebook will not be so confident that a party should have "no difficulty" producing all responsive
 documents in a month when the parties enter merits discovery and Sambrel propounds document
 requests on Facebook.

1 Facebook's actions.

2 **6. Any Hardship Faced By Facebook Is Of Its Own Making.**

3 Facebook suggests that Sambrell has been obstructionist with respect to Facebook's request for
 4 expedited discovery. Nothing could be further from the truth.¹⁵ On March 26, Facebook suggested to
 5 Sambrell that the parties should delay the preliminary injunction hearing so that they could conduct
 6 expedited discovery. Sambrell responded the same day by suggesting that it would agree to the delay
 7 and to discovery if Facebook would agree to a stipulated interim order that tracked the relief requested in
 8 the preliminary injunction. *See* Doc. No. 10-3 at 4-5 (E-Mail from D. Kotchen to J. Basile). Facebook
 9 refused this offer suggesting that it was a "counterproductive demand." *See id.* at 4 (E-Mail from J.
 10 Basile to D. Kotchen). Sambrell followed up by explaining that its concern was that a delay would lead
 11 to continued irreparable harm and that it needed to address this concern to agree to discovery and an
 12 extension. *See id.* at 3 (E-Mail from D. Kotchen to J. Basile). Facebook again rebuffed the offer. *See id.*
 13 at 2 (E-Mail from J. Basile to D. Kotchen). Facebook continues to attack the suggestion as wholly
 14 inappropriate. *See* Doc. No. 10-1 at 2.

15 The approach suggested by Sambrell has been adopted by a number of courts as a means to
 16 protect the rights of the plaintiff while allowing for a postponement in a hearing on a motion for
 17 preliminary judgment. *See, e.g., Inverness Corp. v. Whitehall Labs*, 819 F.2d 48, 51 (2d Cir. 1987)
 18 (concluding that where a judge refused to postpone a preliminary injunction hearing unless a defendant
 19 agreed to the entry of a temporary restraining order, the judge "acted within his discretion in refusing to
 20 postpone the preliminary injunction hearing without protecting Inverness's interests in the interim");
 21 *Chevron Corp. v. Donzinger*, 768 F. Supp. 2d 581, 652-53 (S.D.N.Y. 2011) (noting that the defendant's
 22 refusal to agree to an extension of a temporary restraining order justified the refusal to postpone a hearing
 23

24 ¹⁵ Sambrell's good faith is demonstrated by the fact that it chose not to file an *ex parte* application for a
 25 temporary restraining order, which would have been decided immediately and would have likely forced a
 26 preliminary injunction hearing in less than four weeks. *Cf. Granny Goose Food Inc. v. Brotherhood of*
 27 *Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 441 (1974) (noting that
 28 where a temporary restraining order has been entered, a hearing on a preliminary injunction should occur
 prior to the expiration of the restraining order). Sambrell instead chose to opt for a motion for
 preliminary injunction, which would provide Facebook with an opportunity to file a response prior to any
 decision by the Court.

1 on a preliminary injunction) *reversed on other grounds* by 667 F.3d 232 (2d Cir. 2012).

2 Sambreel offered Facebook a reasonable compromise – the entry of an enforceable interim order
 3 that would protect its rights while allowing Facebook the flexibility it sought. Sambreel made this offer
 4 in spite of its steadfast belief that there is no need for expedited discovery or an extension of the
 5 deadlines in this case as a means to accommodate Facebook. Facebook rejected this compromise, so it
 6 should not now be heard to complain that the schedule is too aggressive.

7 **B. There Is No Reason To Expedite Briefing On The Motion To Dismiss.**

8 Facebook's request for an expedited briefing schedule on its as-of-yet unfiled motion to dismiss
 9 and related request to extend the preliminary injunction hearing until after that motion is decided is
 10 similarly without basis. As a general matter, Facebook must demonstrate good cause for an expedited
 11 briefing schedule. It has not done so.

12 Facebook's only argument in favor of an expedited briefing schedule is to allow the motion to
 13 dismiss to be decided before the motion for preliminary injunction. This does not provide a valid basis
 14 for delay. Courts routinely consider motions for preliminary injunction before or alongside motions to
 15 dismiss. *See, e.g., DaSilva v. Wells Fargo Bank, N.A.*, 3:10-cv-00381-RCJ-VPC, 2010 WL 4258528, at
 16 *1 (D. Nev. Oct. 20, 2010) (deciding motion for preliminary injunction and deferring decision on motion
 17 to dismiss)¹⁶; *Singh v. Ilchert*, 784 F. Supp. 759, 762 (N.D. Cal. 1992) (noting that court had previously
 18 denied motion for preliminary injunction and deferred ruling on cross-motions to dismiss); *Gomez v.*
19 Wells Fargo Bank, N.A., No. 11-cv-2251, 2012 WL 642767, at *1 (S.D. Cal. Feb. 28, 2012) (deciding
 20 preliminary injunction and defendants motion to dismiss federal claims simultaneously while deferring
 21 judgment on motion to dismiss state law claims); *Certified Gasoline Co. v. Dept. of Energy*, No. C-2-81-
 22 379, 1981 WL 1280, at *4 (S.D. Ohio Apr. 20, 1981) (“The Court will defer ruling on the defendants’
 23 motions to dismiss and proceed directly to the question of whether a preliminary injunction should
 24 issue.”); *Massachusetts Municipal Wholesale Electric Co. v. Washington Electric Cooperative, Inc.*, No.
 25 88-0065-F, 1988 WL 39943, at *2 (D. Mass. Apr. 29, 1988) (considering motion for preliminary

26
 27 ¹⁶ *See also DaSilva v. Wells Fargo Bank, N.A.*, No. 3:10-cv-00381-RCJ-VPC, 2010 WL 3910139, at *1
 28 (D. Nev. Oct. 1, 2010) (granting motion for temporary restraining order and deferring both preliminary
 injunction and motion to dismiss).

1 injunction and motion to dismiss simultaneously); *Natural Resources Defense Council, Inc. v. Winter*,
 2 645 F. Supp. 2d 841, 845 (C.D. Cal. 2007) (considering motion for preliminary injunction and motion to
 3 dismiss simultaneously); *Deer Valley Resort Co., LP v. Christy Sports, LLC*, No. 2:07-CV-00904DAK,
 4 2007 WL 4570664, *1 (D. Utah Dec. 21, 2007) (considering motion to dismiss and motion for
 5 preliminary injunction simultaneously).

6 Facebook attempts to demonstrate the need for the expedited schedule by pointing to three courts
 7 that deferred deciding a motion for preliminary injunction until after the court decided a motion to
 8 dismiss. *See* Doc. No. 10-1 at 12. These cases do not help Facebook's cause. In *Maxwell Technologies,*
 9 *Inc. v. Nesscap, Inc.*, the court stayed a motion for preliminary injunction until it could decide whether it
 10 had personal jurisdiction over one of the defendants and whether that defendant had been properly served
 11 with process. *See* No. 06-cv-2311-JAH (Nov. 15, 2006 Order) (attached as Ex. 4 to the Declaration of R.
 12 Klinck). This decision makes good sense because the motion to dismiss raised an issue that could not be
 13 used to oppose the motion for preliminary injunction, and deciding the motion for preliminary injunction
 14 first would effectively deny the party the right to challenge personal jurisdiction.

15 *Douglas v. Dry Creek Rancheria Band of Pomo Indian* provides even less support. In that case,
 16 the plaintiff filed a motion for temporary restraining order and preliminary injunction almost two months
 17 after the motion to dismiss had been fully briefed before the magistrate judge. *See* Docket Sheet
 18 (attached as Ex. 5 to the Declaration of R. Klinck), Dkt. No. 38 (reply brief in support of motion to
 19 dismiss filed on September 5, 2008); *id.* Dkt. No. 42 (motion for temporary restraining order and
 20 preliminary injunction filed October 30, 2008). Four days later, the magistrate issued a Report and
 21 Recommendation granting the motion to dismiss. *See id.* Dkt. No. 44. Two days after that (less than one
 22 week after the TRO motion was filed), the Court denied the motion for temporary restraining order,
 23 finding that there was no showing of irreparable harm, and stayed any briefing in light of the Report and
 24 Recommendation granting the motion to dismiss. *See Douglass v. Dry Creek Rancheria Band of Pomo*
 25 *Indians*, No. CV08-159-S-EJL (Nov. 5, 2008 Order) (attached as Ex. 6 to the Declaration of R. Klinck).
 26 That case clearly does not support Facebook's suggestion that Sambrell's preliminary injunction motion,
 27 which has been pending for two weeks and is set for a hearing in three weeks, should be stayed pending
 28

1 resolution of an as-of-yet unfiled motion to dismiss.¹⁷

2 The distinctions drawn by these cases make good sense. Courts generally proceed with motions
 3 for preliminary injunction without deferring to a motion to dismiss. When both a preliminary injunction
 4 motion and a motion to dismiss are ready for consideration simultaneously, courts consider them both.
 5 Courts have considered motions to dismiss prior to motions for preliminary injunction, on the other hand,
 6 where they are fully briefed and ready for decision well before the preliminary injunction or where a
 7 defendant files a motion to dismiss that challenges a jurisdictional issue that would not be relevant in the
 8 preliminary injunction hearing.

9 In a case such as this one, there is no reason to postpone the preliminary injunction to decide the
 10 motion to dismiss. In responding to Sambrell's motion for preliminary injunction, Facebook is free to
 11 challenge the merits of Sambrell's claims. Facebook foreshadows two arguments that it contends will be
 12 in its motion to dismiss: (1) that Sambrell's antitrust theory is faulty as a matter of law because
 13 Sambrell is attempting to unilaterally set the terms on which it will do business and (2) that Sambrell has
 14 not alleged or suffered an antitrust injury. *See* Doc. No. 10-1 at 12-13. While Sambrell believes these
 15 arguments are frivolous, Facebook is free to make them in its opposition to the motion for preliminary
 16 injunction. In fact, Facebook can oppose the motion for preliminary injunction based upon any
 17 substantive challenge that it would make to Sambrell's legal theory. And this Court's resolution of these
 18 arguments in the context of the motion for preliminary injunction could simplify the motion to dismiss
 19 briefing (e.g., if this Court rejects either party's argument as a matter of law).¹⁸

20 Thus, there is no reason to delay the proceedings on the preliminary injunction – which is already
 21 partially briefed – in favor of an expedited proceeding on an as-of-yet unfiled motion to dismiss. If
 22

23 ¹⁷ The decision in *Table Bluff Reservation (Wiyot Tribe) v. Phillip Morris, Inc.*, No. C-99-2621, 1999
 24 WL 33295030 (N.D. Cal. Nov. 12, 1999) is also unhelpful to Facebook. In that case the court concluded
 25 that the plaintiffs lacked constitutional standing to make their claims and that any claims that could arise
 26 were not ripe because the actions that might cause harm would not occur for nearly a year. *See id.* at *5
 27 fn. 9 & *7.

28 ¹⁸ While Facebook cannot oppose the motion for preliminary injunction based upon deficiencies in the
 29 complaint that could be cured by an amended pleading, there is no reason to delay a motion for
 30 preliminary injunction based upon such an argument in any event. Delaying decision on the motion for
 31 preliminary injunction based upon an easily curable pleading deficiency would serve no purpose other
 32 than delay.

1 anything, the better course would be to expedite the motion for preliminary injunction and defer deciding
2 (and potentially defer filing of) the motion to dismiss until after the preliminary injunction is decided.

3 **IV. CONCLUSION**

4 For the reasons set forth herein, this Court should deny Facebook's request for expedited
5 discovery, should deny Facebook's request for an expedited scheduling for its as-of-yet unfiled motion to
6 dismiss, and should deny Facebook's request to delay the hearing on the motion for preliminary
7 injunction.

8
9 Dated: April 2, 2012

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CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that all counsel of record who have consented to electronic
3 service are being served with a copy of: (1) PLAINTIFFS' OPPOSITION TO FACEBOOK'S *EX
4 PARTE* APPLICATION FOR AN EXPEDITED RULE 16 SCHEDULING CONFERENCE AND AN
5 ORDER FOR EXPEDITED BRIEFING AND DISCOVERY; (2) DECLARATION OF ROBERT
6 KLINCK IN OPPOSITION TO FACEBOOK'S *EX PARTE* APPLICATION FOR AN EXPEDITED
7 RULE 16 SCHEDULING CONFERENCE AND AN ORDER FOR EXPEDITED BRIEFING AND
8 DISCOVERY; (3) EXHIBITS 1 THROUGH 6 TO THE DECLARATION OF ROBERT KLINCK; and
9 (4) DECLARATION OF ARIE TROUW IN OPPOSITION TO FACEBOOK'S *EX PARTE*
10 APPLICATION FOR AN EXPEDITED RULE 16 SCHEDULING CONFERENCE AND AN ORDER
11 FOR EXPEDITED BRIEFING AND DISCOVERY via the CM/ECF system on April 2, 2012.

13 | Dated: April 2, 2012

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